Tentative Rulings for October 7, 2021
Department 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

Begin at the next page

(32)

Tentative Ruling

Re: ***Tovar v. Dunkle***
Superior Court Case No. 21CECG01729

Hearing Date: October 7, 2021 (Dept. 503)

Motion (x2): Petitions to Compromise Claim of a Minor

Tentative Ruling:

To grant the petition for Joaquin Tovar. The Court intends to sign the proposed orders. No appearances necessary.

To grant the petition for Liliana Tovar. The Court intends to sign the proposed orders, as modified. No appearances necessary.

Explanation:

The Court notes that the minor Liliana Tovar's date of birth is misstated at item 9c(2) of the Order Approving Compromise of Claim for Minor. The Court intends to correct this via interlineation.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/1/2021 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***In re Iris Estela Moso***
Superior Court Case No. 21CECG01412

Hearing Date: October 7, 2021 (Dept. 503)

Motion: Compromise of Minor's Claim

Tentative Ruling:

To continue the matter to October 21, 2021, at 3:30 p.m., in Department 503, for petitioner to submit a proposed order to Deposit Funds in Blocked Account (Judicial Council form MC-355), and a properly completed Order Approving Compromise of Claim (Judicial Council form MC-351), as set forth below.

Explanation:

Petitioner's proposed order approving minor's claim states that the proceeds shall be placed in a blocked account or accounts. (See Judicial Council form MC-351(9)(c).) Petitioner, however, has not submitted a proposed Order to Deposit Funds in Blocked Account (form MC-355).

In addition, the Court notes that the minor's date of birth has been omitted from item 9(c)(2) of the proposed Order Approving Compromise of Claim for Minor (Judicial Council form MC-351.) Therefore, petitioner must submit a properly completed proposed order for the Court's consideration.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/5/2021 .
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Alida Alsobrook-Wyrick v. Jose Rivas Pompa***
Superior Court Case No. 20CECG02292

Hearing Date: October 7, 2021 (Dept. 503)

Motion: By Plaintiff to Lift Stay

Tentative Ruling:

To grant and lift the stay imposed on February 11, 2021. A case management conference is set for October 28, 2021, at 3:30 p.m., in Department 402. The status conference set for November 18, 2021 is vacated.

Explanation:

For purposes of California's forum non conveniens analysis, the defendant bears the burden of demonstrating that (1) an alternative forum is available; (2) that said alternative forum is adequate; and (3) that the balance of private and public interest factors tilts heavily in favor of the alternative forum. (*Stangvik v. Shiley* (1991) 54 Cal.3d 744, 751.) With respect to the first requirement, an alternative forum is "suitable" only if (1) there is jurisdiction over the defendant in the alternate forum; and (2) there is no statute of limitations bar to the action. (*Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1464.)

In *Stangvik,* the California Supreme Court held that a suit must be maintained in the forum selected by the plaintiff "no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction" in the forum proposed by the defendant. (*Stangvik v. Shiley, supra,* 54 Cal.3d at p. 752.) In accordance therewith, where it turns out that the alternative forum is not ultimately suitable, the court has the power to lift a stay and proceed with the action in the original forum. (*Diaz-Barba v. Sup.Ct.* (2015) 236 Cal.App.4th 1470, 1489.) Also, by staying an action rather than dismissing it, the court retains the power to verify both that the alternate forum accepts jurisdiction of the action and that the defendants abide by their stipulations. *(Id.* at pp. 1473, 1476.)

In this case, the alternate forum did not accept jurisdiction of the action, and defendant failed to abide by its representations. First, with regard to jurisdiction, the Arizona action was dismissed for lack of jurisdiction, and plaintiff is now unable to pursue her action in Arizona. Defendant argues that the Arizona case was properly dismissed because "[w]hen this Court ruled that Plaintiff's case should be pursued in Arizona, it was assumed, that Plaintiff would follow Arizona law." (Opp. 3:25-26.) Defendant also notes that plaintiff did not serve her complaint until May 10, 2021. (Opp. 3:23.) In advancing this argument, defendant seems to place plaintiff at fault for dismissal of the Arizona action, that plaintiff was dilatory in pursuing the Arizona action after this court issued the order staying the action. However, in its motion to dismiss the Arizona case, defendant argued that, pursuant to Arizona Rules of Civil Procedure section 4.1, subdivision (i),

plaintiff only had until November 3, 2020 to serve defendant. Since this court did not issue the order to stay the instant case until February 11, 2021, it was impossible for plaintiff to serve defendant thereafter, in compliance with Arizona law.

Second, defendant failed to abide by its representations. When defendant moved to stay or dismiss this action, the court found that Arizona was a suitable alternative forum based upon defendant's statements that plaintiff would not be prejudiced by any statute of limitations issue and that defendant was subject to personal jurisdiction in Arizona. However, it is now apparent that defendant failed to submit to jurisdiction in Arizona. Merely 14 days after plaintiff served defendant with the Arizona complaint, defendant moved to dismiss the action based on lack of personal jurisdiction.

The court finds defendant's argument that dismissal of the Arizona action constitutes an adjudication on the merits, barring this action, to be without merit. (See *Diaz-Barba v. Sup. Ct., supra,* 236 Cal.App.4th at p. 1489 [where alternative forum is found not ultimately suitable, court has power to lift stay and proceed with action in original forum].)

Accordingly, the motion to lift the stay is granted.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/5/2021.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***In re Sergio Nathan Arellano***
Superior Court Case No. 21CECG01413

Hearing Date: October 7, 2021 (Dept. 503)

Motion: Petition to Compromise Claim

Tentative Ruling:

To deny without prejudice. Petitioner must file a new petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

Petitioner proposes to accept a compromise of minor Sergio Nathan Arellano's claims arising from an auto collisions for a gross settlement of $8,100, paying $3,310 of the proceeds to cover $5,121 in medical expenses,[1] $675 in costs, and $2,025, in attorney's fees. The remaining proceeds of approximately $2,090 are proposed to go into a special needs trust for reasons not specified in the petition.

The petition presents conflicting information in part, and lacks evidence in part, as to the settlement of medical expenses. Although the petition states that a Medi-Cal lien, by way of the Department of Health Care Services was negotiated down to $510, the letter attached in support reflects acceptance of approximately $791 in full satisfaction. Furthermore, the proposed order submitted on the petition seeks to pay approximately $791. No evidence was presented in the petition to reflect Adventist Medical Center Reedley's acceptance of $700 in full satisfaction. No evidence was presented in the petition to reflect Grant Mercantile Agency, Inc.'s agreement to accept $2,100 for an obligation of $2,450. Furthermore, the proposed order seeks to pay the full $2,450.

In addition, the petition seeks disbursement by way of special needs trust. The petition offers no reasons as to why the minor would require a special needs trust, such as a disruption to public assistance. The proposed order also conflicts with the petition, instead seeking a check disbursement. The proposed order also conflicts on the amount in disbursement, seeking to disburse a balance of $1,283, compared to the $2,090 in the petition. It is unclear what is being requested so that the court may evaluate whether the interests of the minor are served.

Should petitioner seek a special needs trust, petitioner must submit the terms of the special needs trust for review by the court's Probate Division. (Prob. Code, § 3604; Super. Ct. Fresno County, Local Rules, rule 7.19.) Only after the trust is approved may petitioner

[1] The petition duplicates a $680 expense for CEP America, which was ultimately covered by the Department of Health Care Services.

file a new petition in the Civil Division for approval of compromise seeking a special needs trust.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/6/2021 .
(Judge's initials) (Date)

(35)

Tentative Ruling

Re:	***Fries v. Theken et al.*** Superior Court Case No. 20CECG02792
Hearing Date:	October 7, 2021 (Dept. 503)
Motion:	Defendant Nextstep Arthropedix, LLC's Demurrer to First Amended Complaint

Tentative Ruling:

To sustain as to the eleventh cause of action, with leave to amend. To sustain as to the fifteenth cause of action, with leave to amend. To overrule all other grounds. Plaintiff is granted 20 days, running from service of the minute order, to file and serve an amended complaint. All new allegations are to be set in **bold**.

Explanation:

A demurrer is only used to challenge defects that appear on the face of the pleading under attack, or from matters outside of the pleading that are judicially noticeable. (Code Civ. Proc., § 430.10; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Extrinsic evidence from the pleading otherwise cannot be considered. (*Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.)[1]

Defendant generally demurs to each of the fifteen causes of action of the first amended complaint for failure to state a claim. Defendant generally demurs to the fifteenth cause of action for lack of jurisdiction. Defendant specially demurs to each of the fifteen causes of action for uncertainty. Defendant specially demurs to the eleventh cause of action for breach of contract for failure to specify the nature of the contract as written, oral, or implied-in-fact.

The parties appear to agree that the fifteen causes of action are broadly categorized as follows: first through fourth causes of action based on fraud (the "fraud claims"); fifth through tenth, and fourteenth causes of action based on Labor Code wage and hour claims (the "Labor Code claims"); eleventh cause of action based on

[1] Defendant's requests for judicial notice of the filings and findings on prior motions to quash (Exhibits 1 through 3) are granted only to the extent to evidence that such records exist. (Evid. Code, § 452, subd. (d).) The court declines to take judicial notice of the contents of each record. In ruling on a demurrer, declarations filed in the same case which were not made part of the complaint by appropriate reference are not subject to notice. (*Kleiner v. Garrison* (1947) 82 Cal.App.2d 442, 445; *see also Kilroy v. State of Cal.* (2004) 119 Cal.App.4th 140, 145 [finding that courts may not take judicial notice of allegations in affidavits and declarations in court records because such matters are reasonably subject to dispute and therefore require formal proof].) Neither would any of the previous orders defendant seeks to have judicially noticed assist defendant in demurrer; the court previously found that there was conflicting evidence with regard to fraudulent representations as to defendant. For the same reasons, plaintiff's request for judicial notice is granted only to the extent to evidence that such records exist.

breach of contract; twelfth and thirteenth causes of action based on wrongful termination (the "wrongful termination claims"); and fifteenth cause of action based on the Private Attorneys General Act of 2004 ("PAGA").

Fraud Claims. Actual fraud consists in the act, with intent to deceive another party thereto, of a promise made without any intention of performing it. (Civ. Code, § 1572(4).) It is enough to allege the general statement that a promise was made without any intention to perform it. (*See Scafidi v. Western Loan & Bldg. Co.* (72 Cal.App.2d 550, 558.) Actual fraud is always a question of fact. (Civ. Code, § 1574.)

To the extent that orders on prior hearings in this matter contemplate any conclusions, those findings were limited to threshold inquires. Specifically, the question then pending before the court was whether the court held personal jurisdiction over Randy Theken such that the court could enter judgment. (See Code Civ. Proc., § 418.10.) The merits of a complaint on a proceeding for a motion to quash are not placed at issue. (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 110.) In such a proceeding, the plaintiff must do more than merely allege jurisdictional facts, and must present evidence sufficient to justify a finding that California may properly exercise jurisdiction over the defendant. (*Ibid.*) Such evidence comes by way of affidavits or declarations, and authenticated documentary evidence. (*Jewish Defense Organization, Inc. v. Sup. Ct.* (1999) 72 Cal.App.4th 1045, 1054-1055.) On defendant's submission of the same declarations for consideration on demurrer, the court has no authority to consider such. (*Blank*, *supra*, 39 Cal.3d at p. 318.) As above, a demurrer only tests the sufficiency of the pleadings as pled.[2] Thus, for example, defendant's reliance on those declarations to introduce facts not present in the first amended complaint, such as the COVID-19 pandemic, cannot be considered on demurrer.[3]

Here, plaintiff sufficiently states facts to support his various fraud theories. Namely, plaintiff alleges that Theken and company representatives sought to induce him to move from California to Ohio, based on a list of terms for compensation. (FAC, ¶ 17.) Plaintiff alleges that, among others, defendant never intended to honor any of those terms at the time the promises were made. (FAC, ¶ 18.) Plaintiff alleges that, shortly after the promises were made, among others, defendant placed plaintiff and others on indefinite and unpaid furlough, but required plaintiff to continue his duties. (FAC, ¶ 21.) Plaintiff alleges that he requested his due compensation and that defendant had the ability to pay and secured funds for the purposes of making payroll but did not pay plaintiff. (FAC, ¶¶ 24-25.)

For the above reasons, the general demurrer to the fraud claims is overruled.

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[2] Defendant relies on plaintiff's prior declaration to argue an inconsistency between the first amended complaint and plaintiff's admissions on declaration. For reasons already set forth, the court declines to take judicial notice of the prior declaration for its content. Even had the declaration been before the court, the portions of plaintiff's prior declaration cited in defendant's arguments do not contradict the facts alleged in the first amended complaint, and at best merely raises a question of plaintiff's intent in moving.

[3] Defendant's request for judicial notice of Exhibits 4 through 6 is denied.

Labor Code Claims. Defendant argues on general demurrer of the Labor Code claims that Ohio wage and hour laws control over California because the claims arose after plaintiff moved to Ohio. Defendant relies almost exclusively on plaintiff's declaration submitted in the opposition to the prior motion to quash to demonstrate plaintiff's intent.

For similar reasons set forth above in connection with the fraud claims, plaintiff sufficiently states claims under the Labor Code. Plaintiff alleges he was an individual, employed by defendant, while in Fresno County, California. (FAC, ¶ 1.) Plaintiff alleges that, since 2013, he resided and worked in Fresno, California for defendant. (FAC, ¶ 16.) Plaintiff alleges that, for a period of time, negotiations occurred on a temporary relocation from California to Ohio. (FAC, ¶ 17.) After moving to Ohio for temporary relocation, plaintiff returned to California, where he remained ever since. (FAC, ¶¶ 20, 22.)

As the first amended complaint makes no indication of plaintiff's intent to permanently relocate to Ohio, and it affirmatively states plaintiff's intent to temporarily relocate to Ohio from his residence in Fresno, California, where he had been working from since 2013, plaintiff sufficiently alleges being a wage earner of California within the meaning of the Labor Code. (*See Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577-578 [stating that "[i]f an employee resides in California, receives pay in California, and works exclusively, or principally, in California, then that employee is a 'wage earner of California'"].)

The general demurrer to the Labor Code claims is overruled.

Eleventh Cause of Action. To state a cause of action for a breach of contract, the complaint must allege: (1) a contract; (2) plaintiff's performance of the contract; (3) defendant's breach; and (4) resulting damage to the plaintiff. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.)

Defendant makes no showing as to why the first amended complaint fails to plead the above. Plaintiff alleges the existence of an agreement for compensation if he relocated to Ohio. (FAC, ¶ 17.) Plaintiff alleges he relocated to Ohio. (FAC, ¶ 20.) Plaintiff alleges that defendant breached the agreement. (FAC, ¶¶ 20-25.) Plaintiff alleges resulting damages. (FAC, ¶¶ 24-25.)

The general demurrer to the eleventh cause of action is overruled.

Wrongful Termination Claims. Defendant again argues on general demurrer of the wrongful termination claims that Ohio laws control over California because the claims arose after plaintiff moved to Ohio. Defendant argues that plaintiff's decision to travel to California after submitting his resignation does not, itself, dictate the application of California law.

For reasons stated above in connection with the Labor Code claims, the first amended complaint sufficiently alleges that plaintiff was a wage earner of California, subject to the California Labor Code. Plaintiff alleges he was an individual, employed by defendant, while in Fresno County, California. (FAC, ¶ 1.) Plaintiff alleges that, since 2013,

he resided and worked in Fresno, California for defendant. (FAC, ¶ 16.) Plaintiff alleges that, for a period of time, negotiations occurred on a temporary relocation from California to Ohio. (FAC, ¶ 17.) After moving to Ohio for temporary relocation, plaintiff returned to California, where he remained ever since. (FAC, ¶¶ 20, 22.)

To state a claim for unlawful retaliation, a plaintiff must show that (1) he engaged in protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) a causal link existed between the protected activity and the employer's action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) A plaintiff in a retaliation case need only show that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision. (*George v. Cal. Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492.)

To state a claim for wrongful termination in violation of a public policy, a plaintiff must show that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251.) Violations of public policy generally fall into one of four categories: (1) refusing to violate a statute; (2) performing a statutory obligation; (3) exercising a statutory right or privilege; or (4) reporting an alleged violation of a statute of public importance. (*Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1090-1091.)

Plaintiff sufficiently states a cause of action as to both unlawful retaliation and wrongful termination in violation of a public policy. Plaintiff alleges engaging in protective activity under Labor Code section 1102.5. (FAC, ¶ 107.) Plaintiff alleges that defendant subjected him to an adverse employment action. (FAC, ¶ 108.) Plaintiff alleges that there was a causal link between the two. (FAC, ¶¶ 108-109.) Plaintiff alleges that he was constructively discharged for exercising a statutory right to earned wages and to be free from non-compete agreements, and for refusing to violate a statute in being asked to make false statements under oath. (FAC, ¶¶ 114-115.) Plaintiff alleges that, under those circumstances, a reasonable employer would realize that a reasonable employee exercising of that right would be compelled to resign. (FAC, ¶ 27.)

The general demurrer to the wrongful termination claims is overruled.

Fifteenth Cause of Action. Defendant generally demurs to the PAGA claim on the grounds that plaintiff fails to state a cause of action and the court lacks jurisdiction to hear the matter for failure to satisfy the administrative preconditions of filing suit.

Defendant raises a single issue, namely that plaintiff failed to plead compliance with providing a certified mail copy to the employer of the notice filed with the Labor and Workforce Development Agency, prior to initiating the instant suit. (Lab. Code, § 2699.3, subd. (a)(1)(A).) Defendant raises no other issues as to the insufficiency of the PAGA claim.

Although plaintiff alleges compliance with Labor Code section 2699.3 (FAC, ¶ 128), this is a legal conclusion not assumed as true on demurrer. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) Labor Code section 2699.3 unambiguously states

that a civil action by an aggrieved employee "shall commence only after the following requirements are met: (1)(A) The aggrieved employee or representative shall give written notice by online filing with the Labor and Workforce Development Agency and by certified mail to the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." (Lab. Code, § 2699.3, subd. (a)(1)(A).)

Here, plaintiff alleges providing written notice to the Labor and Workforce Development Agency, but not by certified mail to the employer. (FAC, ¶¶ 126-133.) Nowhere in the PAGA claim does plaintiff allege informing defendant, by any means, of the intent to pursue a claim under PAGA, which is a prerequisite to filing. (*See Caliber Bodyworks, Inc. v. Sup. Ct.* (2005) 134 Cal.App.4th 365, 381-382, *disapproved on other grounds by ZB, N.A. v. Sup. Ct.* (2019) 8 Cal.5th 175.)

The general demurrer to the fifteenth cause of action is sustained, with leave to amend.

Special Demurrer – Uncertainty. To the extent defendant specially demurrers to the first amended complaint, such special demurrer must distinctly specify exactly how or why the pleading is uncertain, and where such uncertainty appears by reference to page and line numbers of the first amended complaint. (*See Fenton v. Groveland Community Svcs. Dist.* (1982) 135 Cal.App.3d 797, 809.) Demurrers for uncertainty are disfavored. (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.) Demurrers for uncertainty are strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures. (*Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616.) A demurrer for uncertainty is granted only when the pleading is so incomprehensible that a defendant cannot reasonably respond. (*Lickiss v. Financial Industry Reg. Authority* (2012) 208 Cal.App.4th 1125, 1135.)

Although defendant specially demurs to each of the fifteen causes of action for uncertainty, defendant does not specify exactly how or why the pleading is uncertain, with reference to page and line numbers aside from one instance. Defendant argues that the first amended complaint is vague as to the phrase "sought to induce Fries to move from California to Ohio . . . ." (FAC, ¶ 17.) To demonstrate the uncertainty of the phrase, however, defendant relies on facts outside of the pleading. In effect, defendant demonstrates understanding, by seeking to controvert the facts as alleged.

Although defendant additionally argues uncertainty as to plaintiff's move to Ohio, and plaintiff's decision to return to California, defendant cites no specific language. Thus, defendant fails to demonstrate an inability to reasonably respond, and the special demurrer as to every cause of action is overruled on this ground. (*Lickiss*, *supra*, 208 Cal.App.4th at p. 1135.)

Special Demurrer – Nature of Contract. Where an action is founded upon a contract, the complaint is subject to demurrer if it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct. (Code Civ. Proc., § 430.10, subd. (g).) Where the allegations contained within a claim for breach of contract do not state the nature of the contract, the complaint may also be viewed as a whole, with its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Here, the eleventh cause of action does not clearly state the nature of the contract as written, oral, or implied-in-fact, as required. Neither does a reading of the first amended complaint as a whole reveal any further insights as to the nature of the contract. At best, plaintiff alleges that the terms of the agreement were confirmed in writing. (FAC, ¶ 17.) This alone is insufficient to ascertain whether the contract is written, oral, or implied by conduct.

Therefore, the court sustains the special demurrer as to the eleventh cause of action, with leave to amend.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/6/2021 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Press v. Nordhaven, LLC***
Superior Court Case No. 20CECG02034

Hearing Date: October 7, 2021 (Dept. 503)

Motion: Demurrer by Defendants Nordhaven, LLC, International Glace, Inc., Bill Davis, Alan Sipole, Dan Indgjerd and Rodney Walker to the Second Amended Complaint

Tentative Ruling:

To overrule the demurrer to the second cause of action (breach of bylaws), and sustain the demurrer to the third (usurpation of corporate opportunities), fourth (conversion), and sixth (unjust enrichment) causes of action. To grant leave to amend as to the third and fourth causes of action, but no leave to amend as to the sixth cause of action.

Explanation:

Breach of Bylaws (Second Cause of Action)

"Whether a set of bylaws constitutes a contract 'turns on whether the elements of a contract are present.'" (*O'Byrne v. Santa Monica-UCLA Medical Center* ("*O'Byrne*") (2001) 94 Cal.App.4th 797, 808, quoting *Scott v. Lee* ("*Scott*") (1962) 208 Cal.App.2d 12, 15.) Consideration in a contract is "[a]ny benefit conferred, or agreed to be conferred, upon the promisor, by any other person, *to which the promisor is not lawfully entitled*, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor[.]" (Civ. Code, § 1605, emphasis added.) This means that "[a] statutory or legal obligation to perform an act may not constitute consideration for a contract. (*O'Byrne*, *supra*, at 94 Cal.App.4th at p. 808.)

The court concludes that the issue of whether the bylaws of Sierra Food Group, Inc. ("SFG") constitute, or fail to constitute, a contract "with and among its shareholders," as plaintiff contends (Opp., p. 6:16), cannot be decided on demurrer. The case on which defendants rely, *O'Byrne*, *supra,* was an appeal of a summary judgment motion; therefore, the trial court considered the facts as supported by evidence, and not the adequacy of the pleadings. Similarly, the cases on which plaintiff relies, *Cobb v. Ironwood Country Club* ("*Cobb*") (2015) 233 Cal.App.4th 960 and *King v. Larsen Realty, Inc.* ("*King*") (1981) 121 Cal.App.3d 349, each considered appeals from rulings on petitions or motions to compel arbitration. Such motions or petitions are considered "special proceedings" where factual determinations are made (*e.g.*, the existence of the arbitration contract). So these cases do not illustrate that this issue should be determined on demurrer.

The court in *O'Byrne* cited and quoted *Scott, supra,* 208 Cal.App.2d at p. 15, to state that determination of whether bylaws constitute a contract "'turns on whether the elements of a contract are present.'" (*O'Byrne, supra,* 94 Cal.App.4th at p. 808.) The discussion in *Scott* is instructive.[4] In *Scott*, the plaintiff contended that the bylaws of the defendant association constituted an enforceable contract "by each member with all others," and it relied on several cases. (*Scott* at p. 14.) But the court found as follows:

> The true holding in each case [relied upon by plaintiff] was that the by-laws fixed the rights and duties of the corporation against and to its shareholders. The references to by-laws as a contract <u>among shareholders</u> <u>are but dicta</u>. [….]
>
> It is doubtless true that <u>parties may, as among themselves, assume a contractual obligation to comply with the by-laws</u> and rules of a voluntary association. Whether the by-laws themselves constitute such an agreement turns on whether the elements of a contract are present.

(*Scott, supra,* 208 Cal.App.2d at pp. 14-15, emphasis and brackets added.)

The court then went on to examine whether such elements were present, and found that the bylaws showed "a significantly meticulous avoidance of reference of any obligation among members[,]" and that "each obligation assumed by an individual member is to the association, as distinguished from its members." (*Scott, supra*, 208 Cal.App.2d at p. 15.) Thus, the court concluded that the bylaws did not constitute a "contract enforceable by one member against another." (*Ibid.*)

Here, defendants ask the court to determine at the pleading stage that the bylaws are not a contract due to lack of consideration. However, "[a] written instrument is presumptive evidence of a consideration." (Civ. Code, § 1614; *Kott v. Hilton* (1941) 45 Cal.App.2d 548, 552.) Because of this presumption, courts have ruled that it is unnecessary for plaintiff to allege consideration in the complaint. (*Belletich v. Belletich* (1940) 40 Cal.App.2d 732, 735 ["If the deed here sought to be revised was not based on a sufficient consideration it was incumbent on appellants so to plead in their answer."]; see also *Blonder v. Gentile* (1957) 149 Cal.App.2d 869, 874.) Of course, if the court sustained the demurrer based on defendants' arguments, but gave plaintiff leave to amend, this is exactly what plaintiff would be required to do. No authority was presented to show this issue is properly resolved on demurrer, so the demurrer is overruled.

<u>Usurpation of Corporation Opportunities (Third Cause of Action)</u>

"The corporate opportunity doctrine prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or that is essential to its existence." (*Center for Healthcare Education and Research, Inc. v. International Congress for Joint Reconstruction, Inc.* (2020) 57 Cal.App.5th 1108, 1132, internal quotes and citation omitted.)

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[4] *Scott* was an appeal of a judgment after a court trial (*Scott, supra* (1962) 208 Cal.App.2d at p. 14), so it also does not support resolving this issue at the pleading stage.

The heading to this cause of action indicates it is stated against "all defendants." However, there are no allegations regarding any actions taken by defendant Walker or the entity defendants Nordhaven, LLC, International ("Nordhaven") and International Glace, Inc. ("Glace"). Instead, the allegations at paragraphs 80, 81, and 82 clearly allege this cause of action is brought against the "individual defendants," and earlier in the complaint, at paragraph 31 (General Factual Allegations section), plaintiff specifically defines this term to refer only to defendants Sipole, Davis, and Indgjerd, and it does not include defendant Walker.

It appears from plaintiff's opposition that he is arguing that the actions of defendants Sipole, Davis, and Indgjerd, *acting through Nordhaven and Glace*, is what harmed plaintiff and SFG. He argues: "The Individual Defendants gave lucrative financial opportunities to the companies in which they have an interest in and of which Plaintiff does not have an interest in, namely Nordhaven and Glace. By and through Nordhaven and Glace, the Individual Defendants acted willfully and with the intent to cause injury to both SFG and Plaintiff." (Opp., p. 9:15-18, emphasis added.) Also: "The Individual Defendants acted by and through these companies, and used these companies as the vehicle through which to usurp corporate opportunities." (*Id.*, p. 9:26-28, emphasis added.) Also: "The fact that the Individual Defendants usurped corporate opportunities through the vehicle of another corporation they controlled does not defeat liability." (*Id.*, p. 10:4-6, emphasis added.)

This is essentially contending that defendants Sipole, Davis, and Indgjerd used Nordhaven and Glace as mere instrumentalities to effect their own individual gain at plaintiff's and SFG's expense and harm, which is arguing an alter ego theory. (See, e.g., *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) But plaintiff has not alleged that the entity defendants are the alter egos of defendants Sipole, Davis and Indgjerd, but only that the two entity defendants are the alter egos of each other. Corporations have a separate identity from their shareholders. (*Union Bank v. Anderson* (1991) 232 Cal.App.3d 941, 949; *PacLink Communications Intern., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 963.) Presently, there are no alter ego allegations which would make the entity defendants responsible for the acts of defendants Sipole, Davis and Indgjerd, or that would indicate that they were using the entity defendants as mere shells and instrumentalities to accomplish their own individual ends. There are also no allegations against defendant Walker that would make him liable under this cause of action; the mention of "demand[ing] action" from him before SFG was dissolved (SAC, ¶ 83) is insufficient.

Further, plaintiff does not make clear what the usurped corporate opportunities are, which is important in order to analyze whether this cause of action is actually targeting a corporate opportunity. Defendants suggested in their argument what some of these might be, but it is debatable whether Nordhaven's purchase of SFG's debt, or its decision to foreclose on SFG's assets to satisfy that debt, could be considered SFG's corporate opportunities. Likewise, refusing to take plaintiff's recommendations about potential purchasers of SFG is arguably not a corporate opportunity. This subjects the cause of action to demurrer.

The general demurrer to this cause of action is sustained. Because this is the first time plaintiff has had the opportunity to receive the court's analysis, leave to amend is

granted. But care should be taken in amending, since it appears defense counsel has been making the same points in meet and confer about the defects in this cause of action, and plaintiff's counsel has not heeded the points.

Conversion (Fourth Cause of Action)

Plaintiff states he brings this cause of action on his own individual behalf, as well as on behalf of SFG, against Nordhaven and Glace "for their unlawful acceptance of funds and inventory misappropriated from SFG." (SAC, ¶ 89.) He alleges that the individual defendants (and again, this must be taken to mean only defendants Sipole, Davis, and Indgjerd given the definition of this term at ¶ 31 of the second amended complaint), "conspired to create a new corporation, separate and counter to the interests of SFG, to acquire SFG's debt with Wells Fargo and, ultimately, SFG's assets." (*Id.*, ¶ 90.) The individual defendants then "used these assets, and the previous place of business for SFG, to continue operating an identical business, with the same personnel, and the same products but under a new corporation without Press." (*Ibid.*) At paragraph 91, plaintiff alleges that the subject assets "acquired by Nordhaven and Glace included equipment that was originally a capital contribution to SFG by Press and Walker." At paragraph 93, he alleges this conversion was done by defendants Sipole, Davis, Indgjerd, Nordhaven and Glace.

As an initial matter, there is no mention at all of defendant Walker in this cause of action, so the demurrer must be sustained as to him.

But beyond this, the pleading is deficient in that it seeks to make the individual defendants responsible for acts of Nordhaven and/or Glace, or vice versa, when there are no alter ego allegations that might allow for such responsibility. Just because the second amended complaint alleges that defendants Sipole, Davis, and Indgjerd own Nordhaven does not mean the individuals and the corporation should be treated as one and the same. (*F. Hoffman-La Roche, Ltd. v. Superior Court* (2005) 130 Cal.App.4th 782, 798 ["mere ownership" (there of a subsidiary by a parent corporation) is insufficient to establish alter ego].) And the allegation that the individual defendants "used the assets, (etc.)" at paragraph 90 is insufficient, since according to the allegations these assets (etc.) were owned by Nordhaven. As noted above, corporations have a separate identity from their shareholders. (*Union Bank v. Anderson*, *supra,* 232 Cal.App.3d at p. 949; *PacLink Communications Intern., Inc. v. Superior Court, supra,* 90 Cal.App.4th 958, 963.) If plaintiff seeks to pierce the corporate veil, he must make sufficient allegations to do so. Furthermore, it is noted that there are insufficient allegations to support plaintiff's legal conclusion that Nordhaven's foreclosure on the debt purchased from Wells Fargo was wrongful. Contentions, deductions and conclusions of fact or law are not presumed true on demurrer. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966.) Facts must be alleged which support contentions, deductions and conclusions of fact or law.

This cause of action is also subject to demurrer in that it is not clear plaintiff has standing to raise this cause of action on his individual behalf, since he alleges that the allegedly converted assets were those which were initially contributed by plaintiff and defendant Walker as their capital contributions. (SAC, ¶ 91.) From that point on, therefore, this property ceased to belong to plaintiff. At paragraph 24, plaintiff alleges he "set up more personal equipment including, but not limited to, another stone mill, a

mixer and more packaging lines." But it is unclear if this property was taken as a result of the foreclosure, since in the very next paragraph, plaintiff alleges that the new CEO told him to "move his equipment out of the building to make room for other opportunities." (SAC, ¶ 25.) If plaintiff desires to state this cause of action on his own individual behalf, he must clearly identify what property belonging to him was converted.

The demurrer to this cause of action is sustained, with leave to amend.

Unjust Enrichment (Sixth Cause of Action)

Defendants argue that this claim fails because "unjust enrichment is not a cause of action. This argument appears to be on solid footing:

> [A]s the trial court observed, there is no cause of action in California for unjust enrichment. "The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." (*Lauriedale Associates, Ltd. v. Wilson* (1992) 7 Cal.App.4th 1439, 1448, 9 Cal.Rptr.2d 774.) Unjust enrichment is "'a general principle, underlying various legal doctrines and remedies,'" rather than a remedy itself. (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1315, 265 Cal.Rptr. 525.) It is synonymous with restitution. (*Id.* at p. 1314, 265 Cal.Rptr. 525.)

(*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.)

Plaintiff identifies some cases that appear to have recognized unjust enrichment as a separate cause of action, and one case recognizing a split within the First District Court of Appeal on this issue. (See *O'Grady v. Merchant Exchange Productions, Inc.* (2019) 41 Cal.App.5th 771, 791.) But the court in *O'Grady* indicated that the "point is largely academic because this district has long taken the position that, even if unjust enrichment does not describe an actual cause of action, the term is "synonymous with restitution," which *can* be a theory of recovery." (*Ibid.*) "This is accepted even by the courts which do not consider unjust enrichment a proper cause of action." (*Id.* at pp. 791-792 [citing, *inter alia*, *Melchoir v. New Line Productions, Inc., supra,* 106 Cal.App.4th at p. 793].)

The weight of authority appears to be in favor of concluding it is not a cause of action, but that if a cause of action plaintiff brings supports restitution, then unjust enrichment can be requested as a remedy: "restitution is a *remedy* and not a freestanding cause of action." (*Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 362, emphasis added.) Thus, it can only be sought in connection with a legally cognizable theory that can support restitutionary relief. (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388 [construing plaintiff's unjust enrichment cause of action as "an attempt to plead a cause of action giving rise to a right to restitution," and finding his was not such a claim].) In *McBride v. Boughton,* the court noted that typical causes of action warranting restitution were in cases of quasi-contract claim, i.e., "in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason," or where "the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct." (*Ibid.*)

Thus, the demurrer to plaintiff's unjust enrichment cause of action is sustained without leave to amend, inasmuch as plaintiff may not restate this claim. However, if plaintiff believes he states a cause of action where restitution is appropriate, as noted above, then when amending, he may request restitutionary damages as a part of that claim.

Fifth and Eighth Causes of Action

The court disregards defendants' argument concerning the fifth (unfair business practices) and eighth (civil conspiracy) causes of action, as these were not mentioned in the demurrer, so were not the subject of this motion.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 10/6/2021 .
(Judge's initials) (Date)